Filed 2/9/10 In re P.P. CA2/6

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

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| In re P.P. et al., Persons Coming Under the Juvenile Court Law. | 2d Juv. No. B213962<br>(Super. Ct. No. J-1252089, J-1252090)<br>(Santa Barbara County) |
| SANTA BARBARA COUNTY CHILD WELFARE SERVICES,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>PAUL P.,<br><br>Defendant and Appellant. | |

Paul P. (Father) appeals an order of the juvenile court terminating his parental rights to his children, P.P. and N.P. (Welf. & Inst. Code, § 366.26.) He claims that the Santa Barbara County Child Welfare Services (County) did not comply with the requirements of the Indian Child Welfare Act (ICWA). (25 U.S.C. § 1901.) We conclude, among other things: 1) substantial evidence supports the finding that Father's children were not members or entitled to membership in any Apache Indian Tribe, and 2) Father has not shown that the court erred by making an ICWA non-applicability finding at a post-judgment hearing where Father decided to represent himself. We affirm.

## FACTS

Father was arrested in a "reverse sting operation" after he attempted to purchase a half-pound of methamphetamine and an AK-47 assault rifle. On July 24, 2007, the County filed a juvenile dependency petition (Welf. & Inst. Code, § 300) alleging that Father was incarcerated, his children were "without provision for support," and they faced a "substantial risk of abuse and neglect." When police entered the home where the children resided, they found one child in a bedroom where police found "four bindles of heroin . . . lying on the floor."

The juvenile court ordered that the children be detained and remain in the custody of the Child Welfare Services worker for temporary placement with a relative or in a foster home.

On July 25, 2007, Father filed a "Parental Notification of Indian Status" form (Judicial Council form JV-130) declaring that he was or may be eligible for membership in an Apache Indian Tribe in Phoenix, Arizona.

On August 23, 2007, the County filed with the juvenile court a "Notice of Involuntary Child Custody Proceedings for an Indian Child" form (Judicial Council form JV-135). The form included an executed certificate of mailing showing service on the Bureau of Indian Affairs (BIA) and the eight Apache tribes: the Jicarilla Apache Nation, Yavapai-Apache Nation, Mescalero Apache Tribe, Tonto Apache Tribe, White Mountain Apache Tribe, San Carlos Apache Tribe, Fort Sill Apache Tribe and the Apache Tribe of Oklahoma.

On September 11, 2007, a County worker interviewed the children's grandmother and obtained additional information about the children's relatives.

The County served a second JV-135 notice to the tribes on September 13, 2007. It included information not mentioned in the first JV-135 about the children's grandparents, the children's birth places and it responded to the question on the form about the parents' birth places. The form included an executed certificate of mailing to the tribes.

In response to the first JV-135 notice, the BIA sent a letter dated September 14, 2007, indicating that the County had provided "appropriate notice" to the tribes. In response to the second JV-135, it sent a notice confirming that the County gave appropriate notice to the tribes.

On October 2, 2007, the County filed with the juvenile court a "Return Receipt on ICWA Notification" with the attached certified mail return receipts signed by representatives or agents of the eight Apache tribes, the BIA and the Pascua Yaqui Tribal Council.

The County received letters written on the following dates from each of the eight Apache tribes as follows: Jicarilla Apache Nation (9/12/07 and 9/18/07), Yavapai/Apache Nation (9/24/07), Mescalero Apache Tribe (8/27/07 and 9/24/07), Tonto Apache Tribe (8/29/07 and 9/19/07), White Mountain Apache Tribe (8/29/07 and 9/18/07), San Carlos Apache Tribe (8/30/07 and 10/8/07), Fort Sill Apache Tribe (6/6/08, 6/17/08, 6/23/08 and 7/30/08), and the Apache Tribe of Oklahoma (12/19/08 and 9/4/09). Each of these letters indicated that each Apache tribe had investigated the alleged Indian ancestry of the children and had determined that they were not members of the tribe and not eligible for membership.

The County also received a letter from the Pascua Yaqui Tribe dated September 5, 2007, indicating that the children were not members and not eligible for membership in its tribe.

On February 2, 2009, the juvenile court terminated Father's parental rights. It found that adoption is the children's "permanent plan" and the children would be "referred to the California Department of Social Services or a local licensed adoption agency for adoptive placement." It also found that "[n]otice has been given as required by law." Father filed a notice of appeal.

On August 13, 2009, the County filed an "addendum report" with the juvenile court and requested that the court "make a finding [that] the ICWA does not apply as to the children . . . ."

On September 10, 2009, the juvenile court held a final hearing on ICWA compliance. Father appeared without counsel. The court asked Father whether he was prepared to proceed without counsel and whether he wanted new counsel appointed. He responded that he was prepared and did not need new counsel to be appointed. The court found that the "ICWA does not apply as to these children."

## DISCUSSION

### I. *Compliance with ICWA*

Father contends the County did not comply with ICWA and its notice requirements. He argues that the judgment must be reversed because the juvenile court did not have sufficient evidence to make the finding that the ICWA does not apply. We disagree.

ICWA protects the interests of Indian children and promotes the stability of Indian tribes by permitting tribal participation in dependency actions. (25 U.S.C. §§ 1901, 1902, 1903, 1911, 1912.) "ICWA notice must be sent to all tribes of which the child may be a member or eligible for membership." (*In re E.W.* (2009) 170 Cal.App.4th 396, 402.) "The Indian tribe determines whether the child is an Indian child." (*Alicia B. v. Superior Court* (2004) 116 Cal.App.4th 856, 865.) "'A tribe's determination that the child is or is not a member of or eligible for membership in the tribe is conclusive.'" (*Ibid.*) There are "eight recognized Apache tribes." (*In re N.M.* (2008) 161 Cal.App.4th 253, 265.)

Here Father believed that he was of Apache tribal heritage. He concedes that the County "sent its first ICWA notice to the Pascua Yaqui Tribal Council, the eight federally-recognized Apache tribes, and the BIA, informing them of the jurisdictional/dispositional hearing to be held on August 30, 2007." He claims, however, that the notices were insufficient because they did not contain the children's "birth places, the parents' birth places or any information . . . about the minors' paternal or maternal relatives . . . ."

But the County corrected these deficiencies by sending the second JV-135 notice to the tribes on September 13, 2007.

Father contends that the second set of notices were deficient because they were not mailed to the tribal chairpersons or other designated tribal agents. He claims that simply sending the notices to the tribes was insufficient. He also notes that the County did not file executed return receipts from the mailing of the second notice.

Notice is required to be sent to the tribal chairperson unless the tribe has authorized another agent to receive service. (*In re E.W.*, *supra*, 170 Cal.App.4th at p. 402.) Father is correct that the ICWA notice requirements are strictly construed. (*Ibid.*) But "where notice has been received by the tribe, . . . errors or omissions in the notice are reviewed under the harmless-error standard." (*Id.* at pp. 402-403.) If the tribe responds to a proper ICWA notice "and the *only* omission is the failure to file a proof of service establishing that the notice and a copy of the petition were sent by certified mail, error will not be presumed and compliance will be deemed sufficient." (*In re Elizabeth W.* (2004) 120 Cal.App.4th 900, 907.) In addition, ICWA notice deficiencies may be considered harmless where the tribe declares that the children are not tribal members. (*E.W.*, at p. 403.)

That is the case here. All the tribes responded and determined that the children were not members of the tribe and were not eligible for membership. The BIA determined that "appropriate notice" had been given. The JV-135 notices attached certificates of mailing and the County filed the signed return receipts for its initial JV-135 notice. Most of the tribes made multiple determinations on the children's eligibility for tribal membership. There were a total of 17 separate determinations from the Apache tribes that these children were not Apache tribal members. Father has not shown how sending another notice to these tribes would change the result. Consequently, given the unequivocal determination of non-tribal membership by the Apache tribes, any notice deficiencies are harmless. (*In re E.W.*, *supra*, 170 Cal.App,4th at p. 403.)

Father claims the Fort Sill Apache Tribe responded to a letter written by a County worker on April 21, 2008, but not to the JV-135 notices. But the juvenile court could reasonably infer that the tribe was responding to the JV-135 notices. In an addendum report to the court, the County said the worker "resents" the notices to that

tribe on April 21 because it did not respond to the initial JV-135 notices. Moreover, the Fort Sill Tribe made *four* separate determinations, and each one reached the same result--that these children were not tribal members and were not eligible for tribal membership.

Father notes that in the December 19, 2008 response by the Apache Tribe of Oklahoma, the last letter of the children's surname is misspelled. But he has not shown why the juvenile court could not reasonably find that this was merely a typographical error. Moreover, this tribe sent another response in September 2009 with the correct spelling. In both of these determinations, the tribe concluded that these children were not tribal members.

II. *The September 10, 2009 Hearing and the ICWA Non-Applicability Finding*

Father notes that before entering judgment the juvenile court did not make an explicit finding that the ICWA did not apply. Courts should make this finding, but omitting it does not necessarily mandate a reversal. (*In re E.W.*, *supra*, 170 Cal.App.4th at pp. 404-405 [trial court's decision upheld notwithstanding the lack of an express ICWA finding].) In its judgment terminating parental rights, the court found that "[n]otice has been given as required by law." Moreover, the court ultimately made the non-applicability finding after the filing of this appeal. In proper circumstances, noncompliance with the ICWA may be cured while the case is pending on appeal. (*E.W.*, at p. 403, fn. 2 [ICWA tribal response properly admitted while case was pending on appeal]; *In re Justin S.* (2007) 150 Cal.App.4th 1426, 1432.) Here we granted the County's two requests to augment the record to include the court's ICWA non-applicability finding and other documents. Father did not file an opposition to these motions and has not shown that there was insufficient evidence to support the finding that the ICWA does not apply.

Father claims the juvenile court erred by making an ICWA finding at the September 10 hearing without appointing counsel to represent him. But Father advised the court that he was prepared to proceed in propria persona on the ICWA issue and that he did not need new counsel to be appointed. A parent who is entitled to appointed

counsel may elect to represent himself. (*In re Angel W.* (2001) 93 Cal.App.4th 1074, 1083.) He or she "may waive counsel at any point." (*Ibid.*) Moreover, given the overwhelming evidence of non-Indian heritage presented by the County, any error is harmless beyond a reasonable doubt.

We have reviewed Father's remaining contentions and conclude he has not shown reversible error.

The judgment is affirmed.

NOT TO BE PUBLISHED.

GILBERT, P.J.

We concur:

YEGAN, J.

COFFEE, J.

James E. Herman, Judge

Superior Court County of Santa Barbara

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Lee Gulliver, under appointment by the Court of Appeal, for Defendant and Appellant.

Dennis A. Marhshall, County Counsel, Toni Lorien, Deputy, for Plaintiff and Respondent.